Filed 6/9/17 In re E.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.P., Defendant and Appellant.	E067699 (Super.Ct.Nos. J260966 & J260967) OPINION

APPEAL from the Superior Court of San Bernardino County. Erin K. Alexander, Judge. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

Mother appeals from orders of the juvenile dependency court denying her petition for modification and terminating her parental rights. (Welf. & Inst. Code, § 395, subd. (a)(1).)[1] The subjects of the appeal are two children, J.P., born in 2010, and E.M., born in 2014.

Mother has not shown changed circumstances supporting the children's best interests. We affirm the dependency court's orders.

II

FACTUAL AND PROCEDURAL BACKGROUND

Detention

In June 2015, mother was arrested for severe intoxication while caring for E.M. A social worker from the San Bernardino County Children and Family Services (CFS) visited mother's home and interviewed the child's paternal grandparents. They stated mother drank beer daily, often becoming extremely intoxicated. Mother denied having a problem with alcohol but admitted to having anxiety and depression, and taking psychotropic medication.

Mother's older son, J.P., had lived with his father, M.P., for several years. M.P. had recent arrests for vandalism, burglary, and driving under the influence.

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[1] All statutory references are to the Welfare and Institutions Code.

E.M.'s father, S.M., was incarcerated on drug and domestic violence charges. Mother and S.M. were involved in a domestic violence incident shortly after E.M.'s birth, while both children were present. Mother suffered bruises all over her body.

On June 29, 2015, CFS filed a dependency petition alleging the failure to protect and support the two children as described by section 300, subdivisions (b) and (g). At the detention hearing, the court found a prima facie case, and ordered E.M. detained in foster care, and J.P. released to his father.

Jurisdiction/ Disposition

Mother was born in 1990 and raised in foster care. She moved out on her own when she was 17 years old and was arrested for driving under the influence, for which she received community service. Mother graduated from high school and had a year of college. She worked in the bakery department of a supermarket. Mother and M.P. were together for a few years, breaking up after J.P. was born in 2010. M.P. described mother as a heavy drinker, even during her pregnancy. M.P. would not let mother take J.P. when she was intoxicated.

After mother met S.M., she soon became pregnant with E.M. When E.M. was a few months old, S.M. hit mother and was incarcerated with an unknown release date.

Mother attended the hearing on August 21, 2015, where the court sustained section 300, subdivisions (b) and (g), of the petition, ordered E.M. removed from the parents, and J.P. to remain at home with M.P. The court ordered reunification services for mother and S.M. and family maintenance services for M.P.

Supplemental Petition

In September 2015, M.P. was arrested on a probation violation and sentenced to 90 days in jail. J.P.'s paternal grandfather asked to be J.P.'s caretaker.

On September 18, 2015, CFS filed a supplemental dependency petition alleging J.P. was a child described by section 387. The court found a prima facie case and ordered J.P. detained and placed with the paternal grandparents. Mother was concerned but accepted the placement was best for J.P.'s well-being.

At the hearing on October 13, 2015, the court found the supplemental petition to be true, and ordered reunification services for M.P. and continued placement of J.P. with his paternal grandparents.

Six-Month Review

In October 2015, mother completed a 12-session domestic violence program. Shortly after S.M. was released from prison, mother went to his home and engaged in domestic violence for which mother was arrested. However, mother and S.M. continued to be together. They lived in her car for three days while she drank and he used heroin. Mother was charged with three DUIs between November 2015 and January 2016. After experiencing severe anxiety, mother enrolled in a detox program and contacted the social worker for a referral for residential treatment. The social worker opined mother may have "hit her bottom and is now ready for change to occur." Mother entered residential treatment, declaring, "'I want my kids.'"

Mother visited the children once a week for two hours. Mother's visits were consistent and she was appropriate during visitation. At the March 2016 hearing, the court continued to offer reunification services to the parents.

Twelve-Month Review

In April 2016, mother experienced a relapse while in residential treatment but was allowed to continue in the program. Upon completing residential treatment, mother did not move to a sober living house but instead stayed with S.M. and drank alcohol. The next week, mother entered another residential treatment program until relapsing again in August 2016. Mother was arrested on a warrant relating to a previous DUI. Mother continued to visit the children.

On September 7, 2016, the court terminated reunification services and scheduled a section 366.26 hearing.

Section 388 Petition and Section 366.26 Hearing

In September 2016, J.P. was still placed with his paternal grandparents, and E.M. had been placed in a third concurrent planning home. E.M. appeared to be developing an attachment to his caregivers. Mother continued to visit the children consistently and appropriately. Although E.M. had a hard time separating from his caregivers during visits and had tantrums at the beginning, mother could calm him down. E.M. would also break out in hives after visits. Neither child had a hard time separating from mother at the end of visits.

On January 13, 2017, mother filed a section 388 petition requesting that the court reinstate family reunification services and increase visitation. The petition alleged that,

since the court terminated reunification services, mother had successfully completed a drug treatment program, had all negative drug tests, participated in Alcoholics Anonymous meetings, and visited as often as she was allowed. Mother's petition included a letter from her counselor at Stepping Stones, suggesting mother was stable and capable of parenting the children. The letter explained that since mother had entered the program on October 20, 2016, she had participated in six negative drug tests. Mother attended 12-step meetings and worked closely with a sponsor. She also participated in programs for domestic violence, parenting, anger management, relapse prevention, drug education, life skills, self-help, and weekly one-hour sessions with her primary counselor. Mother was also diligent about visitation, taking a two-and-a-half hour bus ride every Friday to see her children.

At the hearing on February 3, 2017, the court denied mother's request for an evidentiary hearing on the petition. The court found the children adoptable and terminated parental rights.

II

SECTION 388 PETITION

The denial of a section 388 petition is reviewed for abuse of discretion. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) Whether a previously made order should be modified rests within the juvenile court's discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The court's exercise of discretion will not be disturbed except upon a showing of a clear abuse. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Courts have referred to section 388 as an "escape mechanism" to be used when parents make

positive changes after the termination of reunification services but before the termination of parental rights. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Kimberly F.*, at p. 528.)

A dependency court order may be changed or modified under section 388 if a petitioning party establishes one of the statutory grounds—changed circumstances or new evidence—for the modification, and also proves that the proposed change would promote the best interests of the child. (*In re Michael B., supra*, 8 Cal.App.4th at p. 1703.) Section 388 permits any parent to petition "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court" on grounds of "change of circumstance or new evidence." (§ 388, subd. (a)(1).) "If it appears that the best interests of the child or the nonminor dependent may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice . . . ." (§ 388, subd. (d).) Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431.)

Mother argues that the juvenile court abused its discretion by denying her request for an evidentiary hearing on her section 388 petition. A petitioner is required to make a prima facie showing of a genuine changed circumstance or new evidence sufficient to justify a finding that the proposed change would be in the child's best interest. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348.) Specific descriptions of evidence constituting changed circumstances are required. (*Ibid.*) A prima facie showing depends

on "the facts alleged in [petitioner's] petition as well as the facts established as without dispute by the court's own file." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

The term "new evidence" refers to material evidence that, with due diligence, the petitioning party could not have presented at the dependency proceeding at which the order sought to be modified or set aside was entered. (*In re H.S.* (2010) 188 Cal.App.4th 103, 106.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 1432(a).) Thus, if the petition presents any evidence that a hearing would promote the best interests of the child, the court must order the hearing. (*In re Aljamie D., supra,* 84 Cal.App.4th at pp. 431-432.) However, "if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*Ibid.*; § 388, subd. (d).)

Mother argues that her circumstances had changed to such a degree that she was stable and capable of parenting her children. However, as the dependency court recognized, changing circumstances are not enough because, after services are terminated, the focus shifts to the children's needs for permanency and stability. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) The delay caused by a petition does not promote the child's best interests of stability: "'"'"Childhood does not wait for the parent to become adequate.'"' [Citation.]" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.) Where long-term addiction is the primary reason for a parent's unfitness and the child's dependency, a prima facie case is not established if a parent can only show recent sobriety. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223; *In re Marcelo B.* (2012)

209 Cal.App.4th 635, 641-642; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9.)

Here, mother has been a problem drinker since 2007 when she was 17 years old. She drank during her pregnancy with J.P. born in 2010. The dependency was initiated in June 2015 when mother was severely intoxicated while caring for E.M. She had three DUI charges in November 2015 and January 2016. In April 2016, mother left her residential treatment program and used alcohol and engaged in domestic violence with S.M. Mother continued to relapse until August 2016 and the court terminated her services in September 2015. Mother did not begin to improve until October 2016, when she entered another residential treatment program. Mother was only in the residential program for about 10 weeks when she filed her petition in January 2017, claiming that she had provided sufficient evidence to establish a prima facie case that she had achieved sobriety, and could maintain sobriety and stability.

Based on mother's 10-year history of alcohol abuse, ten weeks of rehabilitation was not evidence of changed circumstances. The juvenile court correctly found that mother's circumstances had not changed enough, or for a long enough period, to justify granting her additional reunification services. The court exhibited sound discretion when it found that mother's petition did not establish a prima facie case that modifying the order would be in the children's best interests. The rebuttable presumption that continued foster care is in the child's best interest applies with even greater strength when adoption is the permanent plan. (*In re Angel B., supra,* 97 Cal.App.4th at p. 464.) After twenty months of dependency, mother still could not provide permanency and stability to the

children who were bonded to their prospective adoptive parents. To continue the children in limbo was not in the children's best interests. The trial court's conclusion that adoption would better serve the children's needs for permanency and stability did not exceed the bounds of reason.

IV

THE PARENTAL BENEFIT EXCEPTION

At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of adoption, guardianship, or long-term foster care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50; *In re S.B.* (2008) 164 Cal.App.4th 289, 296.) Adoption is the preferred permanent plan where possible. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) Once the juvenile court finds that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

To avoid termination of parental rights and adoption, a parent has the burden of showing that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, subdivision (c)(1)(A) or (B) apply. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) These exceptions permit the court "to choose an option other than the norm, which remains adoption." (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If there is no evidence that termination is detrimental under one of the exceptions, the statute mandates that the court terminate parental rights. (*In re Jessie G.* (1997) 58 Cal.App.4th 1.)

The parental benefit exception applies when two conditions are shown: the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The relationship must be a parental one, not merely a pleasant relationship with a shared, emotional bond. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Mary G., supra*, 151 Cal.App.4th at p. 207; *In re Angel B., supra*, 97 Cal.App.4th at p. 466.)

To prove the child would benefit from continuing the parental relationship, the parent must show (1) continuation of the parent-child relationship will promote the well-being of the child so as to outweigh the benefit of a permanent home with new, adoptive parents, or (2) a compelling reason why termination of the parental relationship would be detrimental to the child. (*In re Angel B., supra*, 97 Cal.App.4th at p. 466; *In re C.F.* (2011) 193 Cal.App.4th 549, 553.) The balancing of competing considerations involves many variables, including the age of the child, the portion of the child's life spent in the parent's custody, the interaction between parent and child, and the child's particular needs. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349-1350.) The preference for adoption may be overcome if severing the existing parental relationship would deprive the child of substantial, positive emotional attachment such that the child would be greatly harmed. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) The benefit exception is rarely established. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5.)

In this case, mother never progressed beyond supervised, weekly visits of two hours. Mother's visits were often interrupted by her incarcerations. Once her services

were terminated, her visits were reduced. Substantial evidence supports the trial court's finding that mother did not maintain regular visitation and contact with her children.

Furthermore, the juvenile court did not abuse its discretion when it found that preserving mother's relationship with her children did not outweigh the benefits of stability and permanency provided by adoption, and terminating the parental relationship would not be detrimental to the children.

According to mother, her primary interactions with the children consisted of playing with them during her visits. Mother provided no evidence that she acted in a parental role because for 20 months she never progressed beyond weekly, supervised visits. E.M. was bonded with his prospective adoptive parents whom he called "Mama" and "Dada." J.P. did not demonstrate any separation anxiety at the end of the visits with mother. He was often eager to return to his paternal grandparents, who were his prospective adoptive parents.

Mother argues that her case is similar to the situation in *In re Amber M.* (2002) 103 Cal.App.4th 681, in which a psychologist had concluded that mother and Amber had shared a "primary attachment" and "primary maternal relationship" that could be detrimental to Amber if severed. (*Id.* at p. 689.) The psychologist, therapists, and CASA all reported that a beneficial parental relationship existed between mother and the three children that clearly outweighed the benefit of adoption. The social worker was the only dissenting voice. (*Id.* at p. 690.) Although at the time of the 366.26 hearing, mother was not ready for the children's return to her custody, the court noted that "[n]either that fact,

however, nor the suitability of the grandparents' homes can justify the termination of parental rights." (*Ibid*.)

Mother's case is not similar to *Amber M.* There is no evidence of a maternal bond with her children. E.M. has been out of mother's care since he was nine months old in 2015, and J.P. has lived with his father or grandparents since he was one year old in 2011. The children gave no indication of being attached to mother or missing her.

The juvenile court did not abuse its discretion when it found that preserving mother's parental relationship with the children did not outweigh the permanency, security, and stability the adoptive homes would provide the two boys. Furthermore, there was no evidence that terminating parental rights would be detrimental.

IV

DISPOSITION

The juvenile court did not abuse its discretion when it denied mother an evidentiary hearing on her modification petition and when it found the parental benefit exception did not apply. We affirm the orders of the juvenile dependency court.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.